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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 190

E. E. MORGAN COMPANY,

Appellant,

vs.

STATE OF ARKANSAS, FOR THE USE AND BENEFIT OF PHILLIPS COUNTY,

Appellee.

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES UPON APPEAL TO REVIEW JUDGMENT OF THE SUPREME COURT OF ARKANSAS.

Petitioners, E. E. Morgan Company and United States Fidelity & Guaranty Company, submit in compliance with Rule 12 of the Supreme Court of the United States, the following statement of the basis upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Arkansas in above entitled cause.

A.

Statutory Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 237, amended, Judicial Code, 28 U. S. C. A., Section 344.

B.

Statutes of the State of Arkansas the Validity of Which is Drawn in Question.

The statutes of the State of Arkansas the validity of which is drawn in question, are Section 2251 and Sections 2247, 2248, 2249, and 2250 of Pope's Digest of the Statutes of Arkansas.

Section 2251 is as follows:

"*Penalty for Failure to File Articles.*

"Any foreign corporation which shall fail to comply with the provisions of this Act, and shall do any business in this State, shall be subject to a fine of not less than $1,000.00, to be recovered before any Court of competent jurisdiction, and all such fines so recovered shall be paid in to the general revenue fund of the County in which the cause of action shall accrue and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the State, for the use and benefit of the County in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered; and as an additional penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid cannot make any contract in this State which can be enforced by it either in law or in equity; and the complying with the provisions of this act after the date of any such contract, or after any suit is instituted therein, shall in no way validate said contract."

Section 2247:

"*Authority to Do Business.*

"Every company or corporation incorporated under the laws of any other State, Territory or Country, including

foreign railroad and foreign fire and life insurance companies, now or hereafter doing business, (a) in this State, shall file in the office of the Secretary of State of this State a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served (b)."

Section 2248:

"*Filing Resolution of Board of Directors.*

"Before authority is granted to any foreign corporation to do business in this State, it must file with the Secretary of State a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Secretary of State of this State, in any action brought or pending in this State, shall be a valid service upon said Company; and if process is served upon the Secretary of State it shall be his duty to at once send it by mail, addressed to the Company at its principal office."

Section 2249 which relates to the rights and liabilities of foreign corporations upon complying, and Section 2250 which provides for service of process upon auditor of State where no agent for service is designated under Section 2248 are not necessary to the determination of the question presented and are not for that reason set out verbatim.

C.

Date of Judgment and Application for Appeal.

The judgment of the Supreme Court of Arkansas sought to be reviewed, was entered on the 5th day of May, 1941,

and application for appeal together with this Statement of Jurisdiction was presented on the 31st day of May, 1941.

D.

Nature of the Case and Ruling of the Supreme Court of Arkansas.

Suit was brought in the Circuit Court of Phillips County, Arkansas, in the name of the State of Arkansas, for the use and benefit of Phillips County, against E. E. Morgan Company, a foreign corporation under said Section 2251 to recover a penalty or fine of $3,000.00 for having done business in Phillips County, Arkansas, without having complied with said Sections 2247, 2248, 2249, and 2250.

Morgan Company answered admitting that it was a foreign corporation, a corporation under the laws of Mississippi domiciled at Jackson in that State and that it had done business in Phillips County, Arkansas, without having complied with said Statutes, by stating that the business done therein consisted in the construction of a levee in the White River Levee District, for the United States, under contract with the United States, let pursuant to an Act of Congress approved May 15, 1928, the United States through its district engineer having advertised for bids therefor, that Morgan Company had mailed its bid from its office at Jackson, Mississippi, to said engineer at Memphis, Tennessee, that the engineer having accepted its bid, had mailed a contract to it, which it had signed and returned by mail to said engineer at Memphis, and that it thereafter had entered upon and done said work in Arkansas and that said Statutes could not be applied to it and it could not be fined thereunder for having done said work without violating the Commerce Clause and the Due

Process Clause of the Fourteenth Amendment to the Constitution of the United States and the right which the United States gave it and warranted to it.

Plaintiff demurred to defendant's answer on the ground that it stated no defense.

The Circuit Court sustained the demurrer and defendant declining to plead further, entered judgment against it for $1,000 with 6% interest from that date (October 19, 1940) until paid and costs. Defendant, Morgan Company, appealed from that judgment with United States Fidelity & Guaranty Company as surety upon its supersedeas appeal bond, to the Supreme Court of Arkansas, and assigned as errors for the reversal of the judgment, in substance and effect, that the construction put upon the Statutes making them applicable to it and its work made them repugnant to the Commerce Clause of the Constitution of the United States and said Act of Congress enacted thereunder, and that construction and the fining of appellant thereunder made them repugnant to the Due Process Clause of the Constitution, and denied it a right which the Federal Government gave it and warranted to it.

The Supreme Court of Arkansas held that said Statutes so construed were not repugnant to the Commerce Clause of the Constitution and the Act of Congress enacted thereunder and the Due Process Clause of the Fourteenth Amendment of the Constitution and affirmed the Circuit Court's judgment as will more fully appear from the copy of the Court's opinion which will be annexed hereto when this is printed, and entered its said judgment against appellant, Morgan Company, and its surety, United States Fidelity & Guaranty Company.

E.

Cases Sustaining Jurisdiction of the Supreme Court of the United States.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States to review upon Appeal the judgment of the Supreme Court of Arkansas: *Pembina Consolidated Silver Mining and Milling Company* v. *Pennsylvania,* 125 U. S. 181, 31 L. Ed. 650; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, 36 L. Ed. 164; *Johnson* v. *Maryland,* 254 U. S. 51, 65 L. Ed. 126. See, also, *Osborne* v. *Bank,* 9 Wheaton 738, 868, 6 L. Ed. 234.

(S.) Brewer & Cracraft,
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By Wm. M. Hall,
Counsel for Petitioners (Appellants).

EXHIBIT "A".

IN THE SUPREME COURT OF ARKANSAS, MAY 5, 1941.

No. 242.

E. E. MORGAN CO., INC.

v.

STATE.

McHANEY, *J.*:

This is an appeal from a judgment for a $1,000 penalty against appellant, a foreign corporation, for doing business in this state without complying with statutes relating thereto, §§ 2247 to 2250, inclusive, of Pope's Digest. The complaint alleged and the answer admitted the doing of business in this state without such compliance, but the defense was that the only business transacted in this state consisted in the construction of a levee in the White River Levee Drainage District, under a contract with the United States, let pursuant to the Act of Congress approved May 15, 1928, 45 Stat. 534, chap. 569; that the United States, through its District Engineer, had advertised for bids for doing said work; that it had mailed a bid from its office in Jackson, Mississippi, to said engineer at Memphis, Tennessee, which bid was accepted; that said engineer mailed to it a contract, which it signed and returned to said engineer at Memphis by mail; and that it thereafter entered upon such construction work in Arkansas. It, therefore, alleged that it was exempt from said statute, and could not be held liable thereunder without violating the commerce clause and the due process clause of the 14th Amendment to the Constitution of the United States. A demurrer to this answer was interposed and sustained. Upon its refusal to plead further, judgment was entered as above stated. This appeal followed.

The contention of appellant is that the above sections of our statutes have no application to it because it was "work-

ing under employment of the Federal Government in the State of Arkansas". Does that fact exempt it? We think not.

Article 10 of the contract between the Government and appellant requires appellant to "obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work". While this article of the contract is not of controlling importance in determining the question of law presented, it is a declaration that, if the contractor is required by local law to obtain any licenses or permits, it must do so at its own expense and that its status as a contractor with the Government may not exempt it from local law.

Appellant relies upon Osborn *v.* Bank of United States, 9 Wheat. 738. There the Bank was created by an Act of Congress and sought to restrain the State Auditor of Ohio who was attempting to collect a penalty or fine from it because it had established a branch and was doing business in that State without compliance with the banking laws of that State. The injunction was granted in the lower court and sustained in the supreme court. The decision was based upon the distinction there pointed out by Chief Justice Marshall between a "private corporation, engaged in its own business with its own views" and a "public corporation, created for public and national purposes". As to the former, a "mere private corporation", he said it "would certainly be subject to the taxing power of the state, and as an individual would be; and the casual circumstance of its being employed by the Government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of an individual employed in the same manner". As to the Bank it was said: "But the Bank is not such an individual or company. It was not created for its own sake, or for private purposes".

Appellant cites a number of other cases which we have carefully considered, but find them without controlling effect here. We cannot undertake to set them out and point out the distinctions. One of such cases is Gunn *v.* White Sewing Machine Co., 57 Ark. 24. There the point for deci-

sion was whether the appellee, a foreign corporation, was doing business in this State without having complied with our laws. It was held that it was not, but was engaged in interstate commerce. Mr. Justice Battle there quoted from Pembina Min. Co. *v.* Pennsylvania, 125 U. S. 181, as follows: "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce being in the federal government is not to be restrained by State authority." Citing cases. Appellant relies upon the language in the above quotation, "where the corporation is in the employ of the federal government", as being authority for its exemption from our statutes above cited. But we think appellant was not "in the employ of the federal government" in the sense there used. It was under contract with the government and to do a specific job in a certain way, using its own equipment and hiring its own employees, a typical case of independent contractor, and the ordinary relation of employer and employee, master and servant, principal and agent did not exist between it and the government. That it is an independent contractor and is not a government instrumentality there can be no doubt. It was so held in the comparatively recent case of Trinity Farm Construction Co. *v.* Grosjean, 291 U. S. 466, 78 L. Ed. 918, where the appellant unsuccessfully sought to evade the payment of a state excise tax on gasoline consumed by it under a contract with the government, as here, to construct levees on the Mississippi River. See, also, James *v.* Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 125, 58 S. Ct. 208, to the same effect. In James Stewart & Co. *v.* Sandrakula, 309 U. S. 94, 84 L. Ed. 596, the court, speaking of a contract between Stewart & Company with the government to construct a post office building, said: "While, of course, in a sense the contract is the means by which the United States secures the construction of its post office, certainly the contractor in this independent operation does not share any governmental immunity." Citing the Dravo Contract-

ing Co. case, supra, and Helvering *v.* Producers Corp., 303 U. S. 376.

Appellant says these cases are not in point because they relate to taxes to be paid, either property, excise or privilege, or to state regulations after admission into the state, by a foreign corporation. It is conceded that such taxes are payable and local regulations valid, but that the requirements of the above statutes as to admission into the state are not applicable to a corporation doing work in this state under a government contract, because "the Government might be deprived of desirable bids and agencies for its construction work to its loss, for it is easily conceivable that many corporations might rather forego a particular contract with the Government than domesticate generally under the laws of the state where the work is to be done because of the consequences incident to general domestication, not to mention the cost of domestication which in some states is large." This reasoning does not carry conviction, and we can see no more reason for the power to tax such a corporation under state law than the power to require it to comply with state laws in order to do business in the state and to pay the reasonable fees provided therefor.

Nor can we agree with appellant that the requirements of our statutes above cited, as here construed, render them repugnant to either the commerce clause or the due process clause of the 14th Amendment to the Constitution. Trinity Farm Const. Co. *v.* Grosjean, supra.

The judgment is accordingly affirmed.